IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

SECOND APPEAL NO. 39/2006 & CIVIL APPLICATION NO. 67/2006
WITH
SECOND APPEAL NO. 40/2006 & CIVIL APPLICATION NO. 68/2006
AND
SECOND APPEAL NO. 41/2006 & CIVIL APPLICATION NO. 70/2006

SECOND APPEAL NO. 39/2006 & CIVIL APPLICATION NO. 67/2006

1. Mr. Narendra Pandu Chatim,
   Son of Pandurang Chatim,
   of major age, businessman,
   Residing at Badem,
   Salvador-do-Mundo,
   Bardez, Goa.

2. Mrs. Vandana Narendra Chatim,
   Wife of Appellant No.1,
   Of major age, teacher,
   Residing at Badem,
   Salvador-do-Mundo,
   Bardez, Goa. .... Appellants

Versus

Shri Babusso Nilkant Chatim Shirodkar
Aged about 65 years,
Residing at Opposite Cine Prashant,
Curchorem, Goa.
Represented by his lawful
Attorney and his son
Shri Atchut Babusso Chatim alias Shirodkar,
Also residing at opposite
Cine Prashant, Curchorem, Goa. .... Respondent

SECOND APPEAL NO. 40/2006 & CIVIL APPLICATION NO. 68/2006
WITH
SECOND APPEAL NO. 41/2006 & CIVIL APPLICATION NO. 70/2006

1. Mr. Narendra Pandu Chatim,
   Son of Pandurang Chatim,
   of major age, businessman,
   Residing at Badem,
   Salvador-do-Mundo,
   Bardez, Goa.

2. Mrs. Vandana Narendra Chatim,
   Wife of Appellant No.1,
   Of major age, teacher,
   Residing at Badem,
   Salvador-do-Mundo,
   Bardez, Goa. .... Appellants

Versus

Shri Kashinath Nilkant Chatim
Alias Shirodkar, aged about 51 years,
Bachelor, residing at Bepquegal,
Opp. Cine Prashant, Curchorem, Goa,
Represented by his lawful Attorney
Shri Atchut Babusso Chatim Shirodkar
R/o Opp. Cine Prashant,
Curchorem.

Shri N. Costa Frias, Advocate for Appellants.

Shri Guru Shirodkar, Advocate for the Respondent.

CORAM : **P. V. KAKADE, J.**

DATE : **27th September, 2006**

ORAL ORDER:

Heard learned Counsel for both the parties. Perused the record. All these appeals are being disposed of by this common order as the issues involved are identical and parties and Counsel are also the same.

2. The plaintiffs have preferred these appeals against the order passed by the Ad Hoc Additional District Judge, Panaji allowing the appeals and remanding them to the lower Court for hearing afresh on merits.

3. The factual matrix involved in these matters is that the plaintiffs filed the suit against the defendant for declaration, injunction and consequential reliefs. The defendant did not appear and suit proceeded ex-parte against him. The suit was adjudicated on the basis of available evidence laid by the plaintiffs. Thereupon the appellant/defendant preferred the appeal before the Ad-Hoc Additional District Judge, claiming that he was not properly served with the summons in the suit. As a result of which he remained absent and the suit proceeded ex-parte and was decreed against him. The lower appellate Court came to the conclusion on the basis of available record that service was not proper as contemplated by Order 5

Rule 15 of the Civil Procedure Code and, therefore, the trial Court's order decreeing the suit came to be set aside by allowing the appeal and matter was remanded to the lower Court for hearing the suit on merits.

4. The learned Counsel for the appellants has raised two questions for consideration. One is with regard to the non-compliance to the provisions of Order 41, Rule 31 of the Civil Procedure Code, while the second question is, whether the first appellate Court had the jurisdiction to set aside the judgment and decree of the trial Court on the ground that the summons were not duly served on the respondent, in an appeal against a decree, under Section 96 of the Civil Procedure Code, where no such issue was raised by the respondent before the trial Court under Order 9, Rule 13 of the Civil Procedure Code.

5. In other words, the question sought to be raised for consideration is that in absence of any steps taken by the appellant under Order 9, Rule 13 of the Civil Procedure Code whether the appeal was maintainable. My attention was invited to various rulings of Madhya Pradesh High Court as well as Apex Court. The Full Bench of Madhya Pradesh High Court in the case of ***Archana Kumar & Anr.*** **Versus** ***Purendu***

Prakash Mukherjee & Anr. 2000 (4) Civil LJ 482, held that a regular first appeal is maintainable and both the proceedings i.e. proceedings of appeal as well as application under Order 9, Rule 13 of the Civil Procedure Code can simultaneously be proceeded for adjudication. The Apex Court in the case of ***Bhanu Kumar Jain*** **Versus** ***Archana Kumar & Anr.,*** (AIR 2005 SC 626) observed that in case where an ex-parte decree was passed, the remedy available for defendant was to file either an appeal or an application under Order 9, Rule 13 of the Civil Procedure Code to set aside the ex-parte decree. It was further observed that when an application under Order 9, Rule 13 of the Code is dismissed than he could not by filing first appeal dispute the correctness of Order 43, Rule 1 to show cause for his non-appearance. In other words, the Apex Court has categorically observed that it is a settled law that both the remedies are open for the aggrieved parties i.e. either he can file substantive appeal or can file an application under Order 9, Rule 13. In the present case, no such application was filed under Order 9, Rule 13 but the defendant preferred to file present appeal which was in my considered view perfectly legal and valid.

6. The second point sought to be raised is regarding applicability of the Order 41, Rule 31 of the Civil Procedure Code. The learned Counsel

has submitted that no points for determination came to be framed by the lower appellate Court while disposing of the appeal and setting aside the order of the lower Court. In support of his submission, reliance was put on the Judgment of this Court in the case of ***Shri Bernard B. Gomes alias Peter G. Gomes & Ors.*** **Versus** ***Smt. Prescilla Lopes E Fernandes & Ors.*** (1999 (3) ALL MR 477), wherein, the single Judge of this Court has observed that when lower appellate Court in its judgment merely referring to the contents of memo of appeal and agreeing with arguments advanced by advocate for respondents but not applying its mind to the points for determination, then judgment had to be set aside for non-framing of points for determination and thus violating mandate of Rule 31 of the Order 41 of the Civil Procedure Code. In my considered view, there cannot be two opinions regarding the ratio laid down by the learned Single Judge. However, that would not be applicable to the present case. In this case, the facts and circumstances involved differ, in the sense that when appeal was adjudicated on merits of the dispute, than it was incumbent upon the lower appellate Court to strictly comply with the provisions of Order 31, Rule 41 of the Civil Procedure Code. However, when the only issue before the lower appellate Court was with regard to proper service of the suit summons to the appellant/defendant, than it is sufficient that it is properly dealt with,

while coming to the conclusion that there was no service. Moreover, though the appeal is allowed, what is directed is remand of the matter for adjudication afresh on merits and, therefore, I am of the considered view that the mandate of Order 31, Rule 41 of the Civil Procedure Code would not be strictly applicable to the present case, only for want of framing of points for determination, especially when there was only one point under consideration of the lower appellate Court. Under the circumstances, I do not see any illegality committed by the lower appellate Court as alleged.

7. So far as Second Appeal No. 41 of 2006 is concerned, the learned lower appellate Court has observed that on the basis of available record, he was not inclined to accept the contention of respondents that the appellant was duly served and had deliberately remained absent. It was further observed that in other sister matters also, the said matter was regarding landed property and the appellant could not be deprived of from putting up his defence of his suit on technical grounds. Moreover, the record is also sufficient to show, including the bailiff's affidavit that finding recorded by the lower appellate Court is definitely not perverse. In the case of ***Kondiba Dagadu Kadam*** **versus** ***Savitribai Gujar*** (1999) 3 SCC 720, the Apex Court has categorically observed that the concurrent findings of

facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under Section 100 of the Civil Procedure Code, as it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court.

8. In view of these aspects, I pass the following order;

9. All the Second Appeals No. 39/2006, 40/2006 and 41/2006 fail and stand dismissed with no orders as to costs. Consequently, Civil Applications no. 67/2006, 68/2006 and 70/2006 also stand dismissed with no orders as to costs.

All issues taken up by the appellants are left open.

P. V. KAKADE, J.

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